

Centre State Relations in India

Prof. Uday Shankar

Rajiv Gandhi School of Intellectual Property Law

Indian Institute of Technology, Kharagpur

Week 06: Financial Relations: Allocation of Taxing Power; Distribution of Revenue, Goods and Services Tax, GST Council

Lecture 30: Financial Emergency

Greetings to all of you. We have been discussing financial relation and they and we have completed our discussion on distribution of revenue. We have completed our discussion on the role of the finance commission that how and what parameters are being taken into account for the distribution of revenue between the Centre and the States. And we have also discussed that what are the government accounting system and inter-governmental immunity provisions under the Constitution. Let us today discuss the provisions which are there in the Constitution on the issue of financial emergency. Now it is important to take note that the provisions what we have discussed relates with the financial situations during ordinary situation during normal situation.

And the significance of the Indian Constitution is that Indian Constitution addresses the issues in a very comprehensive way where it clearly guides the government that how you shall get governed during normal situation and what shall be the measures to be taken when there is an emergency when there is a crisis like situation. So today we will be discussing a situation which is not related to normal financial governance. We will be discussing about a situation where there is an emergency on the financial front. So what we will discuss is that what are the provisions on financial emergency, how it has been debated in the Constitutional Assembly Debates and then what is the effect of financial emergency on Centre State relations and we shall also try to look at it that how US position is there on financial emergency.

The reason for discussing US position is that the provisions related to financial emergency under the Indian Constitution is somewhere inspired by the US position and the references is been

drawn from the US position. So the distinctiveness of the law and legal system lies in the very fact that they deal with situation which occurs in a regular course and they suggest the mechanism for addressing abnormal situation for addressing a situation which may arise which cannot be force it and this is something which is very natural because it is not that the situation would always be under one's control. A situation may arise where the normal decision making process may not be good enough for addressing the scenario and that is why emergency related provisions becomes very important. One for the issues of emergency provisions under the Indian Constitution you find that there are three important subjects on which emergency provision provisions are there under the Indian Constitution. First is the emergency when there is armed rebellion, war like situations which is given under Article 352 then the second one where there is a failure of the constitutional machinery when there is a complete breakdown of constitutional machinery then the Constitution talks about the process to handle such situations under Article 356 and then the third one when there is an economic downturn or there is a financial crisis and which requires tackling of the scenario in a different way that is what is given under Article 360 of the Constitution. So financial emergency is being discussed in Article 360 where President is empowered to make a declaration with regard to financial emergency if the President is satisfied that it is a case of financial stability or credit of India is under threat then in such a situation it is can be done.

Till date financial emergency provision has not been invoked in India. So Article 360 has never been invoked. Let us look at that how the provisions are there, what kind of guidelines are being let down under the Constitution to deal with financial emergency or financial crisis. When you look at the history you find that under Government of India Act 1935 there has been there had been no provisions which deals with financial emergency and therefore what has been incorporated in 1950 is not based on Government of India Act 1935. It is based on the reference of the US position. So the framers of the Constitution they looked into the relationship between the Centre and the States. It shows their farsightedness where they realize that in addition to emergency in a war like situation or failure of constitutional machinery in a State. We also need to address the financial emergency and that is how they provided this provision related to financial emergency in the second reading of the Indian Constitution. When I say second reading what it signifies is the processes through which drafting, deliberation and finalization of the

Constitution of India took place. So we have got a debate which took place on this matter. It was debated on when Chairman of the Drafting Committee introduced the provisions. As I said that originally when the Draft Constitution was prepared there was no such provisions on financial emergency it was included and under the Draft Article it was Article 280A which was introduced by the Chairman of the Drafting Committee and then you find that certain members have suggested that what shall be the provisioning with regard to financial emergency.

So when Dr. Ambedkar proposed it was suggested that the idea had come from the National Recovery Act of 1933 of the United States wherein it was provided that the President shall be authorized to take necessary measures during economic and financial crisis. Now in this when the matter was being debated on the at the Constituent Assembly Mr. Saxena made an important observation he said that let us not use the word “has arisen” in terms of emergency because that would signify that as if emergency has already occurred and thereafter the government is acting upon the same. So what is suggested is that let us use the word “imminent” which would say that even the government has acted in anticipation.

So that is what was suggested by Mr. Saxena. The other members also said that Parliament should be given a power to enact laws on State List as if it is the Concurrent List when there is a financial emergency and then you find that Mr. Kamath was of the opinion that President of the Union with further emergency powers or powers in excess of what have been conferred on him by the Constitution. So in a way authorizing the Union government to tackle the situation in an effective way was the kind of idea.

The proposals given was negative even with regard to proposal given by Mr. Saxena to substitute the word “has arisen” with “imminent” that is also been negative. So what is financial emergency under Article 360 when you look at it, it says that it is the President who needs to get satisfied and when I say President it is the Union government which needs to get satisfied that there is financial stability and credit of India is under threat and if such situation comes in then they can proclaim financial emergency which can be revoked or varied by subsequent proclamation. Article 360 says that the resolution with regard to financial emergency needs to be placed on the floor of the House. This provision becomes very important because Constitution of India makes a very clear design that though the Union government is been entrusted with the task of

addressing the situation of emergency but then finally the elected representative should give an approval or rejection on such measures taken by the Union government by the Executive. So when you look at the grounds it talks about financial stability or credit of India.

So these are the grounds on which it can be done. So financial stability one can simply connected with the non-governmental aspects whereas credit of India has to do with Reserve Bank of India where it fails or it is about to fail or there is a situation of kind of uncontrollable inflation and government is not in a position to contain the same. These are the two situations which are provided in Article 360(1). So financial stability one can say that it is threatened when there is some failure in the market or one can also say about credit of India when there is a failure on the part of the regulation done by the government. This is what two circumstances given under Article 360 of the Constitution.

So a situation whereby credit of India is threatened would amount to a situation where financial stability of India would also be under threat or a situation where only financial stability of India is under threat might not be severe so as to threaten credit of India. So there is an attempt to draw an inter-relationship where it has been argued that a situation may rise where financial stability of market may be such where credit may also get disturbed credit or collapsed but then other way round may not happen where financial stability of India is under threat but then it may not adversely affect the credit of India. Credit of India if it is collapsed if there is a failure on regulation of the RBI or regulation of inflation then one can very well assume that it has also connected with or it may also lead to a failure of the market it may also cause financial instability in India so that is how we need to look at the relationship. What shall be the duration of financial emergency given under the Constitution? It says that the maximum duration shall be 2 months unless and until both the Houses approves the resolution with regard to financial emergency. Further it says that if the House of People is dissolved then in such a situation resolution can be adopted in the Council of States and that resolution will give continuation to the emergency proclamation and once the House of People gets notified then within 30 days of such notification again the matter has to be taken up and if House of People approves it then it then the proclamation of emergency continues

So you can very well make out that with regard to emergency Raja Sabha or Council of States they have been given a prominent position where it has been said that the resolution can continue even when the House of People is dissolved. So that is what an important role which Council of States plays during emergency and one may say that this kind of authorization is very appropriate because Council of States technically represents the States. So how a financial emergency affects Centre-State relations? Article 360(3) says that Union Executive is entrusted with the power to give any directions to the State to observe such propriety, such kind of measures which is required for maintaining the financial stability and such other directions as the President may deem necessary or adequate. So you can very well look at it that the federal structure gets transferred into unitary one where directions power to direct is been entrusted upon the Union executive power to direct to the State government that is what it says. Further Article 360(4) says that the provisions of the Constitution are being overridden with this where what is required is if salaries and allowances are to be reduced or where some kind of cutting is to be done in the interest of maintaining financial health of the country then such directions can be issued and such directions can be issued with regard to government employees both State government employees and Union government employees including the judges all the Supreme Court and the High Courts.

So you can very well make out that a very sweeping power is been interested upon the Union Executive to deal with the situation of financial emergency. So you can very well find that it is something on a parallel line with the emergencies provided under Articles 352 and 356 where power structuring is completely reoriented, realigned and from federal system it becomes a kind of unitary system during the emergency. But then the best part is that there is a timeline given in the Constitution unless and until it gets approval by the elected representative that is what is a kind of safeguard drawn under the Constitution where it says that that Union Executive shall always be accountable to the legislature and accountability becomes more pertinent and relevant when Union Executive excises the power asserts the power by invoking emergency provisions. Article 360(4) says that directions can be issued with regard to Money Bills or all other Bills where which is given under Article 207 where it says that such Money Bills or all other Bills can be reserved for the consideration of the President after they are passed by the State Legislature.

So additional route has been suggested where a kind of scrutiny be done by the Central Government on the measures taken by the State government.

So again you can find unitary feature here under Article 360(4). Article 250 says that Parliament shall while a proclamation of emergency is in operation have power to make laws for any of the matters enumerated in the State List. So look at it how the during emergency Parliament gets a kind of over sweeping power and authority on the subject matter of on the subject matter which is there in the State List. If such law is been made it shall expire within a given time frame. It says a law made by Parliament under Article 250(1) which Parliament would not but for the issue of proclamation of emergency ceases to have effect on the expiration of period of 6 months after the proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period. So that is what is the kind of timeline given for such legislative measures taken by the Parliament because such measures are to be justified and legitimized only for addressing the emergency situation and not to not to really make it a kind of permanent positioning vis-a-vis the lawmaking authority of the State that is what categorically kind of limitation let down under the Constitution. When you talk about emergency provisions generally it is been argued that emergency provisions are not to be made subject to judicial review because it is the subjective satisfaction of the government which is good enough to justify the imposition of emergency and thus let it not become a subject matter of judicial scrutiny through the court of law.

But then this provisioning has been modified, this understanding has been modified where it has been suggested that though there is reviewability done by the Parliament on the executive action of the Union where the Constitution categorically says that the decision of emergency needs to be approved by the Parliament. But at the same time it also says that in addition to parliamentary review there may be a situation where the very invocation of power given under Article 360 is not as per the Constitution and such continuation of proclamation of emergency should be not allowed. So, the phenomenal judgment given in SR Bommai where the court has categorically said that in relation to Article 74 where it says that the advice shall not be questioned in the court of law whatever advice the government gives to the President and obviously all these emergencies are being imposed as per the scheme of the Constitution on the advice of the Council of Ministers. It is not that the President acts on his own President always goes by the

advice given and Article 74 makes it very clear that such advices shall be shall be not subjected to judicial review because such advices are of nature that where measurable standards may not be there for the court to look into it. It would also impinge upon the idea of separation of power where judiciary may not have relevant know-how, may not have relevant competence to really get into the question of on what circumstances the government has advised the same to the President and whether such circumstances are good enough or not. One has to go by the wisdom of the government that is what it says but in SR Bommai the court has carved a kind of a route for the court to interfere where the court has said that advice is something which is not reviewable but then material on which advice has been given that is to be reviewed that whether the material is connecting with the advice or not. For example there is a material A and B and advice is C so if A and B connects with the advice given which is C then the court should not look into it even though the material A and B requires further supplementation by material let us say D so even if D is not been consulted but A and B leading to C is good enough for the court to stay away. But then court can very well interfere and review the decision when material A and B is not connected with C at all if C is advised and A and B is the material which the government has looked into it and if there is no connection whatsoever between the material and the advice then such advice should not be as per the constitutional scheme because it does not have any backing of the material and therefore such advice can be declared to be advised not as per the Constitution and the decision taken by the government shall be unconstitutional. So that is what is the kind of law let down in SR Bommai in order to create a safeguarding on the issue of excise of power by the government and at the same time drawing a kind of check and balance where the government excises the power by the same time that excise of power must be within the limit of the constitutional scheme and the court being the arbiter on the matter of constitutional scheme court can very well take a call that whether the discharge of the function is as per the Constitution or not.

So but then the court has made it very clear that what we shall examine is not the advice what we shall examine is the material. So we will not get into that whether this is an appropriate advice given or not, we will not also get into the question that whether material is not, we will simply look at it that whether the material which has been consulted whether it has got a connect with advice rendered or not. If answer is no then such action must be declared to be unconstitutional.

So SR Bommai Case is a very important judgment for ensuring the accountability of the government on the issue of constitutional space and maintaining the constitutional design, that's the important aspect of SR Bommai judgment. Now as I said that there was no provision under Government of India Act 1935 and therefore the framers looked at the 1933 Act of the United States. So let us briefly look at it that what is there under 1933 Act of the United States and how the Indian positioning is improvised one, how we have not simply borrowed it but then we have looked into our situation and then accordingly we have given a framework for addressing the Indian situation. So this is a National Industrial Recovery Act which primarily deals with the issue of industrial recovery where it says that the President may establish any administrative agency for giving effect to the policy declared. The Act also says it talks about the establishment of Federal Emergency Administration of Public Works for utilization of services of officers and employees and the Secretary of Treasury is authorized to withdraw such amount as required to meet the expenditure. So when you compare this with the Indian position it says that because of different kind of federal structuring we have adopted you find that President in both the countries are wide in their own sphere to meet the needs of financial emergency.

Indian Constitution empowers the President to issue directions to the State Legislature requiring the matter of Money Bills or other Bills also and what it says is that money Bill or other Bill requires to be reserved for assent of the President. Indian executive under the Indian Constitution has also given a wide power to give directions to the State which is not there in the American Constitution. If you look at it the directions include even cutting down the salaries of the State employees which otherwise is purely a subject matter falling within the State jurisdiction. So that is important deviations done or an important improvisation done in the Indian scheme. These are the references for this module. Thank you very much.